



## MONTGOMERY COUNTY ETHICS COMMISSION

Nina Weisbroth  
*Chair*

Stuart D. Rick  
*Vice Chair*

Advisory Opinion 12-04-006

June 13, 2012

You have requested an advisory opinion or waiver regarding two fundraising activities for Montgomery County Police to engage in on behalf of the Special Olympics. These activities are known as *Cops-on-Rooftops* and *Tip-A-Cop*.

Two prior Ethics Commission opinions have addressed inquiries related to police fundraising on behalf of the Special Olympics. Those opinions are 1995-3 and 11-10-005. The 1995 opinion addresses official police department participation in *Tip-A-Cop* activities while the 2011 opinion addresses off-duty, out of uniform participation in *Tip-A-Cop* fundraising activities.

According to your inquiry, *Cops-on-Rooftops* is a Special Olympics fundraiser that is a collaborative effort between Dunkin' Donuts and law enforcement. Uniformed police officers nationwide are stationed on the roofs of Dunkin' Donuts stores. Officers lower baskets to people below who are donating to Special Olympics. Depending upon the amount of the donation, the contributor of the money will receive a Dunkin' Donuts coupon or a Special Olympics Torch Run t-shirt. The money collected by the officers goes directly to Special Olympics and does not pass through Dunkin' Donuts. Additionally, each involved Dunkin' Donuts store typically donates a percentage of that day's sales to Special Olympics. All funds received by officers will be turned over to the Department's coordinator of the activity who will forward the funds to the Special Olympics. It is anticipated that approximately a dozen officers will be involved in the program.

*Tip-A-Cop* is a Special Olympics fundraiser held in collaboration with restaurants throughout the country. Uniformed police officers are paired with the restaurants regular wait staff and serve as "celebrity waiters." These officers may be on duty. At the end of the meal, the officers provide the patrons an envelope in which they can leave a "tip" which goes directly to the Special Olympics; this money does not go through the restaurant. The restaurant's regular wait staff handles the food bill and their own tip. As with *Cops-on-Rooftops*, the restaurant typically donates a percentage of that day's *Tip-A-Cop* proceeds to the Special Olympics. Donations received by the police officers will be turned over to the Department coordinator who will turn

**Montgomery County Ethics Commission**

---

100 Maryland Avenue, Room 204, Rockville, MD 20850  
OFFICE 240-777-6670, FAX 240-777-6672

over all funds raised to the Special Olympics. You anticipate that 10 to 15 officers will be involved in this program. You state that the Maryland State Police and numerous local police agencies participated in one or both of these programs.<sup>1</sup>

The pertinent sections of the Ethics Law are as follows:

Section 19A-14 of the Montgomery County Code 1994 provides:

- (a) A public employee must not intentionally use the prestige of office for private gain or the gain of another . . . .
- (b) Unless expressly authorized by the Chief Administrative Officer, a person must not use an official County agency title or insignia in connection with any private enterprise.
- (c) A public employee must not use any county agency facility, property, or work time for personal use or for the use of another person, unless the use is: (2) authorized by a County law, regulation, or administrative procedure.

Section 19A-16 of the Montgomery County Code provides:

- (a) A public employee must not solicit a gift to the employee or another person or organization: . . . (2) during official work hours, or at a County agency . . . (3) while wearing all or part of an official uniform of a County agency , or while otherwise identifiable as a public employee. . . .
- (b) However, a public employee may solicit a gift: . . . (3) from any person, during official work hours, while identifiable as a public employee, or at a County agency, for the benefit of . . . a nonprofit organization formally cooperating on a program with a County agency if the solicitation is authorized by the county Executive or (for public employees of the legislative branch) the President of the Council in an order printed in the County Register that designates: (A) the public employee authorized to solicit the gift; (B) the purpose for which the gift is sought; (C) the manner in which the gift may be solicited; (D) the persons or class of persons from whom gifts may be solicited.

You indicate that the Police Department will obtain an executive order under § 19A-16(b)(3) to permit officers to solicit donations to the Special Olympics while in uniform, including officers in an “on-duty” status. As the Executive Order is not currently in place, what it will say is not set, but it would need to meet all of the requirements set forth in § 19A-16(b)(3), including (b)(3)(A-D).

---

<sup>1</sup> No published opinions or waivers from the Maryland State Ethics Commission or County Ethics Commissions have been found through online research addressing fundraising for the Special Olympics other than those cited previously from Montgomery County.

The 1995 Ethics Commission opinion considering a request for approval for the Police Department to participate in a *Tip-A-Cop* fundraising activity in conjunction with Red Lobster restaurant found:

This particular program involves cooperation between employees of a County agency and a private enterprise that is operated for profit. Based upon the facts presented and the applicable sections of the Ethics Law, the Ethics Commission must deny the request for the Montgomery County Police Department to participate in the Tip-A-Cop Program with Red Lobster. The nature of the restaurant precludes the establishment of an Executive Order that would permit the solicitation of donations pursuant to Section 19A-16(b)(3) of the Ethics Law, quoted above. Moreover, in light of the representation of Red Lobster that their business increases and profits on the evenings of the program, the participation of police officers would be using the prestige of office for private gain of another.

Your current submission seeks to distinguish the 1995 opinion on the basis that:

1. Money collected by officers will not be donated to Special Olympics in the name of either Dunkin' Donuts or any participating restaurant.
2. The Police Department will donate directly to Special Olympics the money that officers receive.

Your submission states that while the participating restaurants will likely have an increased volume of sales as a result of the event, the Police Department will not become involved in any decision to "offset" profits by the restaurants deciding to provide donations to the Special Olympics. The participating restaurants will decide for themselves what contributions they make. You indicate "that any gain to Dunkin' Donuts or the participating restaurant is incidental and very limited in scope. The purposes and effect of the program is to raise revenue for Special Olympics, not to promote or unjustly enrich a particular third party."

The Ethics Commission acknowledges that the facts submitted seeking to distinguish the question presented from the 1995 opinion tend to mitigate some of the concerns raised in the 1995 opinion. In particular, keeping the funds raised by police separate from the host entities reduces the interrelationship between the police department and the private third party and emphasizes the police department's focus on providing assistance to the Special Olympics. In the 1995 instance, the raised funds would flow through the restaurant and be presented to Special Olympics in the name of the restaurant. Though the opinion does not mention it, it would seem possible that a tax benefit might accrue to the restaurant through a corporate charitable deduction. Under your current proposal, with funds flowing through police officers and the police department to the private charity, this particular economic benefit appears less likely.

However, the introduction of your distinguishing facts does not fundamentally alter the nature of the question that was posed to the Commission in 1995, which pivots on the participation of third

party for-profit entities in the fundraising enterprises. Without the participation of third-party entities, §19A-16(b)(3) would clearly authorize the County Executive to issue an order authorizing the Police Department to engage in fundraising activities on behalf of the Special Olympics (as long as the specific requirements of §16(b)(3) were otherwise met.) Explicitly stated, the question posed for the Ethics Commission is whether, under the Public Ethics Law solicitation exception at §19A-16(b)(3), the County Executive can authorize the Police Department to fundraise for a charity where a third party for-profit enterprise is integral to the fundraising program and could obtain a private benefit from the fundraising effort.

In answering this question, the Ethics Commission does not view itself as the place for studies to be conducted on the economic effects on private entities of fundraising activities conducted jointly with Montgomery County employees. Here, as in the 1995 instance, the prospect of added business to the private enterprise is likely. And other variables of economic benefit (and detriment) may apply to the private enterprises as well, such as tax benefits and the value of good will and positive advertising associated with supporting a charity. There may be competitive advantages or disadvantages from a private company's participation. The Commission notes that different restaurants have participated in these fundraising activities in the past. Competition may factor into whether Dunkin' Donuts or Krispy Kreme are involved (or both are) in *Cops-on-Rooftops* or what restaurants will sponsor *Tip-A-Cop*.

Therefore, for purposes of this opinion, and with respect to your inquiry regarding *Cops-on-Rooftops* and *Tip-A-Cop*, the Ethics Commission recognizes that there are material economic consequences to the third party entities involved: the mitigating factors do not eliminate the element of private gain. What the Ethics Commission is in a position to conclude is that these fundraising efforts have an impact on private enterprises and as indicated in 1995, "the participation of police officers would be using the prestige of office for private gain of another." While it may be, as you submit, that the purpose and effect of the program is to raise revenue for Special Olympics, we think your contention that the "gain to Dunkin' Donuts or the participating restaurant is incidental and very limited in scope" is speculative and unsupported. We understand that the benefit to these private third parties is, as it was in 1995, incidental to the Police Department's desire to be supportive of the Special Olympics.

However, the analysis does not end here. The Public Ethics Law provides that an Executive Order can permit county officials to use government time and uniform to solicit gifts for a charity. Any residual question of use of prestige of office for private gain of the charity is overridden by the express exception allowing such solicitations of gifts for a charity where an executive order is obtained. (The prestige of office provision cannot be read to override the express language of the exception.) But the Tip-A-Cop proposal in 1995 added the element of private benefit accruing to third parties as a party to the fundraising activity. And the Ethics Commission concluded: "The nature of the restaurant precludes the establishment of an Executive Order that would permit the solicitation of donations pursuant to Section 19A-16(b)(3) of the Ethics Law." In other words, the 1995 opinion asserts that the Executive Order exception does not extend to use of prestige of office for private gain of third party private entities that, for example, sponsor fundraising activities for nonprofits.

The Public Ethics Law contemplates that with an order of the County Executive (or the President of the Council as to employees of the legislative branch), public employees will be able to participate in certain charitable fundraising activities. The 1995 opinion in essence states that if a private third party may accrue a benefit as part of the arrangement pursuant to which the fundraising is to take place, that the benefit to the third party is beyond the scope of what the County Executive can order. In short the 1995 opinion stands for the proposition that, the County Executive may not order the participation of police officers to participate in charitable fundraising that also may benefit third parties because that would constitute authorizing use of prestige of office for private gain beyond the scope of the 16(b)(3) exception.

But the 1995 opinion is not the only opinion from the Ethics Commission addressing the scope of an Executive Order in the context of fundraising that has tangential impacts on third parties. Advisory Opinion No. 03-21 addresses a question of whether the “Montgomery County Law Enforcement Choir” may conduct a concert to raise money for a non-profit organization. The facts described in that opinion reflect that pledges will be sought and reflected in a booklet, and furthermore, that “a local merchant has agreed to provide formal wear in exchange for a credit in the booklet.” While the opinion does not discuss the issue of private gain to a third party, there are implicit effects on the private merchant. First, the merchant will obtain the benefit of positive advertising in the fundraising booklet for having participated by providing formal wear. Second, it may be that the merchant was benefiting by obtaining a tax deduction for making a contribution to a charitable fundraising activity. It is entirely speculative what benefit may have accrued to the private merchant; but the Ethics Commission now recognizes that there would have been an impact on the private gain of the third-party merchant.

It occurs to the Ethics Commission that the only difference between the benefits that accrue to the private participants referenced in the 1995 opinion and those in the 2003 opinion are a matter of degree. And since the degree to which a benefit accrues to private parties as part of a fundraising enterprise is a remarkably complex economic question that is difficult if not impossible to measure, the Ethics Commission adopts an alternative paradigm for consideration of the extent to which charitable fundraising involving private parties may be authorized under § 19A-16(b)(3).

In doing so, the Ethics Commission notes the following: first, the Public Ethics Law contemplates that the County Executive can authorize charitable fundraising activities. Second, as the Ethics Commission advisory opinions 1995-3 and 03-021 show, charitable activities may involve third parties in varying ways. And because the nature of benefits that may accrue to private third parties is an obtuse economic question, the Ethics Commission is neither in a position to address or distinguish the extent of benefits in one case from another, other than to say that in some instances, such as those in the 1995-3, the effects may be greater than in another. Third, while § 19A-16(b)(3) inherently involves an override of the prestige of office prohibition insofar as employees can be authorized to benefit charities, it can also be read as extending the override on the prestige of office provision to benefits (that are incident to the charitable fundraising activity) to private third parties who are involved in a collaborative

fundraising enterprise with County employees. Under this paradigm, County employees could be authorized by the County Executive to participate in the *Tip-A-Cop* and *Cops-on-Rooftops* campaigns without violation of the prestige of office provision. While this is a different result than the 1995 opinion, it is consistent with the 2003 opinion. Fourth, the Ethics Commission also notes the authority in the Public Ethics Law at § 19A-14(b) for the Chief Administrative Officer to authorize a person to use official County or agency title or insignia in connection with any third party enterprise. The Ethics Commission views this provision as providing additional support for the notion that an Executive Order under § 19A-16(b)(3) to conduct charitable fundraising can be issued in conjunction with events involving private third parties. It would be incongruous for the Ethics Commission to conclude that the County Executive could not authorize charitable activities because third parties were involved but that the Chief Administrative Officer could separately authorize others to use official County or agency title or insignia in connection with private third parties.

The conclusion of the Ethics Commission that the County Executive can, pursuant to the authority in § 19A-16(b)(3), authorize the Police Department to be involved in charitable activities such as *Tip-A-Cop* and *Cops-on-Rooftops* does not constitute a recommendation that that authority be utilized. In connection with any exercise of the authority, the Ethics Commission respectfully suggests consideration of a number of elements.<sup>2</sup>

The Ethics Commission recommends the County Executive, before issuing Executive Orders in favor of one charity over another, consider that there are more than 1.2 million non-profit charities in the United States.<sup>3</sup> The Special Olympics is but one charity of many deserving charities. The County Executive should consider what criteria he will use to distinguish between one charity and another charity that seeks similar treatment from the County. Presumably other non profits will want the benefit of County employees' utilizing taxpayer paid time and resources to further their causes as well; without standards and criteria to distinguish when such authority will be utilized, the County Executive could be criticized regarding fairness and preferential treatment.

---

<sup>2</sup> Section 19A-16(b)(3) requires that the fundraising be for the benefit of a County agency or a nonprofit organization formally cooperating on a program with a County agency. So prior to the issuance of an executive order, the County Executive should obtain the document establishing the formal cooperation between the County agency and the non-profit organization. Moreover, since the County Executive is who would be exercising the authority for employees in the Executive branch of county government, the County Executive and the Executive Order should outline what limitations, if any, should apply to the activity. The County Executive should expressly state that only the activities authorized in the Executive Order are authorized and should delineate and define the scope of the order.

<sup>3</sup> <http://www.guidestar.org/rxg/analyze-nonprofit-data/resources-for-understanding-nonprofit-sector.aspx>



Among the criteria might be one which requires the fundraising effort to be in furtherance of the mission of County government and more particularly the County agency whose employees are involved in the fundraising activity in their official capacity. The Ethics Commission believes that County resources should not be used in a manner that is not in furtherance of County Government objectives. Furthermore, consideration should be given to the proposed cost to the County of the activity and the placement of limits on the amount of County resources, such as employee time, that may be dedicated to the activity. Moreover, an Executive Order might stipulate that private for profit entities or individuals may not obtain as a result of participation in the fundraising activity an advantage in dealing with a participating County agency or organization.

In the event the County Executive is unwilling to specifically order the activity, to include specific reference to the private company participants, the Ethics Commission is unlikely to issue a waiver. The Ethics Commission is not inclined to issue waivers under circumstances where it is required to study the extent of private gain accrued by private parties as a result of activity of public employees. Moreover, the Ethics Commission cannot conclude that the first element in the Public Ethics Law's 19A-8(a)(1) standard for its issuance of waivers is met, that "the best interests of the County would be served by granting the waiver."

This opinion is issued in the context of the recurring questions about involvement of the Police Department in fundraising activities associated with the Special Olympics and addresses the facts presently before the Commission. This opinion is not intended to address all permutations of relationships between County government, charities, and private third parties, and a different set of facts could alter the analysis.

For the Commission:



June 13, 2012

\_\_\_\_\_  
Date

\_\_\_\_\_  
Nina Weisbroth, Chair